Supreme Court, U.S.
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No. 07-1386

IN THE

Supreme Court of the United States

GERI KANNAPIEN AND JANICE ROZHON,
Petitioners,

v.

QUAKER OATS COMPANY AND PEPSICO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS QUAKER OATS COMPANY'S AND PEPSICO'S BRIEF IN OPPOSITION

CONSTANTINE L. TRELA, JR.*
PRISCILLA E. RYAN
ERIN E. KELLY
JULIE M. WEBER
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, Illinois 60603
(312) 853-7000

Counsel for Respondents Quaker Oats Company and PepsiCo

July 7, 2008

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether an estoppel claim can be established with respect to an unambiguous ERISA pension plan based upon an admittedly innocent oral misstatement by an employee who was neither an administrator nor a fiduciary of the plan and who directed the claimants to consult the appropriate source for information concerning the benefits to which they would be entitled if they elected to accept early retirement.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, PepsiCo, Inc. is the parent corporation of Quaker Oats Company. PepsiCo, Inc. has no parent corporation. PepsiCo, Inc. owns 100% of the stock of Quaker Oats Company. No publicly held company owns 10% or more of the stock of PepsiCo, Inc.

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RESPONDENTS QUAKER OATS COMPANY'S AND PEPSICO'S BRIEF IN OPPOSITION

Quaker Oats Company ("Quaker") and PepsiCo, Inc. respectfully submit this brief in opposition to the petition for a writ of certiorari filed by Geri Kannapien and Janice Rozhon.

COUNTERSTATEMENT OF THE CASE

Petitioners, former employees of Quaker, brought this action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, and Illinois state law seeking additional pension benefits under the Quaker Retirement Plan. The district court granted summary judgment dismissing petitioners' claims. The Court of Appeals for the Seventh Circuit affirmed, finding that petitioners had failed to establish any of the required elements of an estoppel claim under ERISA. Petitioners assert that the Seventh Circuit's decision as to one of those elements – that a knowing or intentional

misrepresentation have been made – creates a conflict among the circuits and should be reviewed by this Court. No conflict is created by this case, however, because petitioners' failure to establish *any* of the elements of their claim required dismissal regardless of whether an intentional misrepresentation is required. Moreover, petitioners could not prevail under any of the formulations of the requirements for an ERISA estoppel claim which petitioners contend are used in other circuits. The petition should be denied.

I. The Facts

In early 2003, the Quaker Oats Company offered certain salaried employees who worked at a plant in Bridgeview, Illinois an opportunity for voluntary early retirement. If an employee accepted this opportunity, Quaker would treat the employee's early retirement as an involuntary termination, which would permit the employee to receive two types of benefits in addition to her normal retirement benefits. First, the employee would receive severance benefits under the terms of Quaker's Severance Pay Plan (the "Severance Plan"). Second, the employee would receive additional pension benefits under the change in control provisions of the Quaker Retirement Plan (referred to herein as "CIC" benefits). Under the terms of the Quaker Retirement Plan, the CIC benefits were payable to employees of Quaker whose employment was involuntarily terminated within two years after a change in control of Quaker, and a change in control had occurred when the stockholders of Quaker voted to approve a merger of Quaker into a subsidiary of PepsiCo, Inc. on May 1, 2001.

Petitioners were salaried, at-will employees at Quaker's Bridgeview plant. They volunteered for

early retirement pursuant to Quaker's offer, and Quaker terminated their employment in response. Petitioners' severance benefits were calculated under the terms of the Severance Plan, and their pension benefits, including their CIC benefits, were calculated under the terms of the Quaker Retirement Plan. The amounts payable under the Severance Plan and the amounts payable under the Retirement Plan depend in part upon a participant's years of credited service under each plan. Under the express terms of the Severance Plan, petitioners' employment at the Golden Grain Company, a company Quaker acquired in 1986, was included in the calculation of their credited service for severance pay purposes. In contrast, under the express terms of the Quaker Retirement Plan, petitioners' credited service for pension purposes began on July 1, 1990, the date they became participants in that plan.[1]

Petitioners do not dispute that their employment at Golden Grain was not credited service under the terms of the Quaker Retirement Plan. Instead, petitioners point to conversations they had with Jeffrey Satterlee, a manager at the Bridgeview plant, in which Satterlee mistakenly told them that the CIC benefits were to be calculated based on their years of employment with both Quaker and Golden Grain. It is undisputed that Satterlee's mistake was entirely innocent and that he did not intend to mislead petitioners. It is also undisputed that Satterlee, who was neither a plan fiduciary nor administrator (*see*

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[1] As the court of appeals explained, the pre-existing Golden Grain Profit Sharing Plan remained in effect for some time following Quaker's acquisition of Golden Grain and provided former Golden Grain employees with retirement benefits for the period prior to their 1990 enrollment in the Quaker Retirement Plan. Pet. App. 3a-4a, 9a.

Pet. App. 19a-21a), instructed petitioners to contact the Quaker Employee Administration Center to obtain their actual benefits estimates, because, he explained, he could not compute their benefits for them. Satterlee at no time suggested that the early retirement offer would change any of the terms of the Quaker Retirement Plan. *Id.* at 7a.

Petitioners also point to a benefits estimate statement each had received some months prior to the announcement of the early retirement offer, which listed their credited service date as the date they were originally hired by Golden Grain. It is undisputed that this was an inadvertent clerical error. *E.g.*, Pet. App. 12a. It is also undisputed that the estimated pension benefit amounts provided in these statements were calculated using the correct credited service starting date of July 1, 1990, and thus accurately reflected the pension benefits actually payable to petitioners under the Quaker Retirement Plan.

In connection with the early retirement offer itself, each petitioner was given a written summary of the elements of the offer, which explained that the CIC and other pension benefits were to be paid from the Quaker Retirement Plan. The written summary also explained that the benefits were to be based on "years of service," a defined term in the Retirement Plan that equates to credited service, which began on July 1, 1990 for petitioners.

After they left Quaker, petitioners realized that their pension benefits were calculated based upon their credited service beginning on July 1, 1990, as required under the Quaker Retirement Plan, and that their pension benefits did not take into account their prior employment with Golden Grain. They filed this lawsuit in response.

II. The District Court Proceedings

Petitioners' original complaint alleged estoppel and breach of fiduciary duty claims under ERISA. After petitioners were denied leave to amend their complaint to add a claim for violation of ERISA's "anti-cutback" provision, 29 U.S.C. § 1054(g)(1), they moved for (and were granted) leave to file a Second Amended Complaint. Petitioners subsequently sought (and were granted) leave to file their last complaint, the Third Amended Complaint, which added two Illinois state law claims to their previously-asserted ERISA estoppel and fiduciary duty claims.

The district court granted respondents' motion for summary judgment on all claims asserted in the Third Amended Complaint and entered final judgment. The district court held that petitioners had failed to support any elements of their claims under ERISA and that their newly-added state law claims were preempted. Pet. App. 23a-49a.

III. The Decision Of The Court Of Appeals

On appeal, the Seventh Circuit affirmed. Pet. App. 1a-22a, *reported at Kannapien v. Quaker Oats Co.*, 507 F.3d 629 (7th Cir. 2007). In accordance with long-settled law, the court of appeals noted that to prevail on an estoppel claim under ERISA, plaintiffs must show:

> (1) a knowing misrepresentation; (2) made in writing; (3) reasonable reliance on that representation by them; (4) to their detriment.

Id. at 11a-12a. The court then reviewed the facts in the light most favorable to petitioners and found that "they fail[ed] to satisfy any required element of an ERISA-estoppel claim." *Id.* at 12a. As the court

explained, "the Retirement Plan unambiguously defines 'credited service' as commencing on July 1, 1990 for both women, and ... neither Kannapien nor Rozhon can prove that she relied on any knowing written misrepresentation by Quaker." *Id.* at 19a. And, the court observed, it was undisputed that petitioners had received all benefits to which they were entitled under the Quaker Severance and Retirement Plans. *Id.* at 2a, 11a, 16a. With respect to the Illinois state law claims, the Seventh Circuit affirmed the district court's determination that those claims were preempted by ERISA because petitioners were "pursu[ing] benefits to be paid from the ERISA Retirement Plan." *Id.* at 21a-22a.[2] The Seventh Circuit subsequently denied petitioners' petition for rehearing and rehearing *en banc*, *id.* at 50a-51a, and their motion to stay issuance of the mandate.

REASONS FOR DENYING THE PETITION

The petition purports to present two questions for review by this Court – one regarding the scope of ERISA preemption, and the other the knowledge or intent element of a claim of estoppel under ERISA. Pet. i. As to the first question, petitioners present no analysis or argument whatsoever, offering only a single short restatement of the question itself. *Id.* at 4. No assertions of a circuit split or any other bases for review of this question are presented. In light of petitioners' failure to address this question, and particularly in light of the "'clearly expansive'" nature of ERISA's preemption of state law (*see Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 146 (2001)),

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[2] The court also affirmed the summary judgment dismissing petitioners' fiduciary duty claims under 29 U.S.C. § 1132(a)(3)(B), Pet. App. 19a-21a, a ruling not addressed in the petition.

further consideration of this question is unwarranted, and respondents therefore will address only petitioners' second question, relating to ERISA estoppel.

As to this question, petitioners do present an argument for review, but their argument is wrong. Petitioners claim that the Seventh Circuit's determination that a plaintiff asserting an ERISA estoppel claim must establish a knowing or intentional misrepresentation is in conflict with decisions of the First, Second, Third, Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits. Pet. 5-7, 9, 11-13. But, petitioners failed to establish *any* element of their estoppel claims, not merely a knowing or intentional misrepresentation, and they do not challenge the lower courts' findings in that regard. Therefore, whether ERISA estoppel does or does not require a knowing misrepresentation is irrelevant to the disposition of this case. Moreover, because of their failure to establish any element of an estoppel claim, petitioners could not prevail under any of the alternative standards they propose. Finally, and in any event, the conflicts plaintiffs see among the circuits are illusory – nothing more than differences in wording that have no substantive effect upon the claims asserted here.

I. THE QUESTION ON WHICH PETITIONERS SEEK REVIEW IS NOT PROPERLY PRESENTED IN THIS CASE.

As a threshold matter, the issue petitioners ask this Court to review, *i.e.*, whether a misrepresentation must be knowing or intentional to create an estoppel under ERISA, was not necessary to the decision of the Seventh Circuit, and thus the disposition of that issue can have no impact on the ultimate result in this case. Moreover, even under petitioners'

characterization of the requirements for ERISA estoppel in other circuits, they could not prevail under any conceivable standard. For both of these reasons, the question raised in the petition is not properly presented for review.

A. Petitioners Failed To Establish Any Element Of Their Estoppel Claims.

To establish an estoppel claim under ERISA, plaintiffs were required to show (1) a knowing misrepresentation; (2) made in writing; (3) reasonable reliance on that representation; (4) to their detriment. Pet. App. 11a-12a (citing *Vallone v. CNA Fin. Corp.*, 375 F.3d 623, 639 (7th Cir. 2004); *Coker v. Trans World Airlines, Inc.*, 165 F.3d 579, 585 (7th Cir. 1999)). The Seventh Circuit applied these requirements in determining that petitioners had failed to establish their ERISA estoppel claims.

Petitioners argue that one of the requirements imposed by the court of appeals – a knowing misrepresentation – is unwarranted and inconsistent with the law in other circuits. But, the court did not rest its decision solely on the admitted absence of any knowing or intentional misrepresentations. To the contrary, the court found, and petitioners do not dispute, that none of the other elements of ERISA estoppel had been established. The only alleged written misrepresentation was the erroneous credited service date on the benefits estimate statements delivered months before any mention of the early retirement opportunity. Because the benefits statements correctly calculated and reported the actual amount of each petitioner's estimated benefits, the court found that this was not a misrepresentation, but merely a clerical error. Pet. App. 14a. While Satterlee did make an oral misstatement, albeit a concededly innocent one, the

court held that because the terms of the Quaker Retirement Plan were not ambiguous or misleading, the oral misstatement could not form the basis for an estoppel claim. *Id.* at 14a. Finally, the court found no evidence of "any reliance – detrimental or otherwise – by [either petitioner]" on any alleged written misrepresentation. *Id.* at 16a; *see also id.* at 33a-34a & n.4 (no reasonable, detrimental reliance on any misstatements, oral or written). Therefore, regardless of any need to show a knowing or intentional misrepresentation, petitioners failed to establish an estoppel claim.

B. Even Under Petitioners' Characterization Of The Standards In Other Circuits, Their Claims Would Fail.

While petitioners largely mischaracterize the ERISA estoppel standards in other circuits or provide incomplete descriptions of those standards (*see* section II, *infra*), even under petitioners' own characterizations of the standards, their claims would fail. The requirement, or lack thereof, of a knowing or intentional misrepresentation would have no bearing on the disposition of petitioners' claims under any of the standards they present.

The undisputed facts here show nothing more than an innocent oral misstatement by a single Quaker employee, who told petitioners he could not compute their benefits and who instructed them to consult the designated internal source for information concerning employee benefit plans, the Quaker Employee Administration Center, to obtain a benefits estimate. Pet. App. 12a-13a. It is undisputed that the Quaker Retirement Plan itself and the Summary Plan Description are clear and unambiguous (*id.* at 13a-15a), and that the written description of the early retirement opportunity given to petitioners

accurately described its terms and made clear that the early retirement benefits were governed by the Retirement Plan (*id.* at 14a-15a). And, it is undisputed that petitioners received all benefits to which they were entitled under that Plan. *Id.* at 2a, 11a, 16a. On this record, petitioners cannot establish a claim for ERISA estoppel no matter how the test may be articulated in a particular circuit.

Petitioners place heavy reliance, for example, on what they say is the standard in the Second Circuit. According to petitioners, that circuit requires "(1) a promise, (2) reliance on the promise, (3) injury caused by the reliance, (4) injustice if the promise is not enforced, and (5) 'extraordinary circumstances.'" Pet. 6 (citing *Aramony v. United Way Replacement Benefit Plan*, 191 F.3d 140, 151 (2d Cir. 1999)). Putting the other elements to one side for the moment, petitioners cannot establish the threshold element – that respondents made a "promise" to them regarding the calculation of their benefits. The benefits estimate statements petitioners received had nothing to do with the early retirement opportunity and, in any event, correctly calculated petitioners' benefits based on the correct years of service. Nor was Satterlee's innocent misstatement a promise concerning petitioners' benefits. In fact, it is undisputed that Satterlee told each petitioner that he could not calculate the amount of her benefits and that she should contact the Quaker Employee Administration Center to obtain a benefits estimate. *Id.* at 12a-13a. Far from being a "promise," Satterlee's conversations with petitioners are exactly the type of "commonplace communication from employer to employee" that the Second Circuit has made clear *cannot* form the basis for an estoppel claim. *Aramony*, 191 F.3d at 151.

As petitioners concede, one of the required elements in each of the Third, Fifth, Sixth, and Ninth Circuits is reasonable and detrimental reliance. Pet. 7-10. As the lower courts found in this case, petitioners failed to establish any reasonable reliance – detrimental or otherwise – on any alleged misrepresentation. Pet. App. 16a, 33a-34a. With respect to the innocent oral misstatement by Satterlee in particular, petitioners cannot show that reliance would have been reasonable in light of the undisputed fact that the Quaker Retirement Plan is unambiguous and in light of Satterlee's caution that he could not calculate petitioners' benefits. *Id.* at 12a-13a, 33a-34a.[3]

In the Ninth and Eleventh Circuits, a plaintiff must show that the plan terms were ambiguous and that the misrepresentation concerned an oral interpretation of that ambiguity. *See* Pet. 8-9, 11. Similarly, petitioners assert that the First Circuit has "noted that a narrow window for estoppel recovery might be possible where the representation relied upon reflected an *interpretation* of ambiguous plan terms." *Id.* at 14 (citing *Law v. Ernst & Young*, 956 F.2d 364, 370 n.9 (1st Cir. 1992)). Here, petitioners have conceded that the terms of the Quaker Retirement Plan were neither ambiguous nor misleading (Pet. App. 14a, 15a).

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[3] The Third, Fifth, and Ninth Circuits, like the Second Circuit, also require "extraordinary circumstances" (Pet. 7-9), and petitioners have established nothing more than an innocent misstatement by a Quaker employee, who told petitioners that he could not compute their benefits. These circumstances are not "extraordinary" under any formulation of that element. Indeed, as petitioners point out (*id.* at 8 n.3), the Fifth Circuit has refused to find extraordinary circumstances where an oral representation was inconsistent with the clear terms of the plan.

Finally, petitioners acknowledge that estoppel is unavailable in the Fourth Circuit when "it would effect an amendment to a written ERISA plan." Pet. 12 (citing *HealthSouth Rehab. Hosp. v. Am. Nat'l Red Cross*, 101 F.3d 1005, 1010-12 (4th Cir. 1996)). Given that the unambiguous terms of the Quaker Retirement Plan provide that petitioners' credited service began on July 1, 1990, a fact petitioners concede (Pet. App. 14a), petitioners' claims for benefits using earlier credited service dates, if successful, would necessarily "effect an amendment to a written ERISA plan."

In the end, this case, involving an innocent oral misstatement concerning the calculation of credited service pursuant to the terms of an unambiguous ERISA plan, does not present the question on which petitioners seek review – whether an ERISA estoppel claim requires proof that a misrepresentation was knowing or intentional. Because petitioners cannot prevail under any standard, regardless of the answer to this question, the petition should be denied.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING THE APPLICATION OF ERISA ESTOPPEL TO THE CLAIMS ASSERTED BY PETITIONERS.

As noted above, the elements of an ERISA estoppel claim as articulated by the Seventh Circuit are (1) a knowing misrepresentation, (2) made in writing, (3) on which the plaintiffs reasonably relied, (4) to their detriment. Pet. App. 11a-12a. These are the same elements recognized and applied in every circuit cited by petitioners. While different circuits use different verbal formulations when articulating the requirements for an ERISA estoppel claim, petitioners have not identified any differences that matter for purposes of their claims. In particular,

although some circuits use the rubric of "extraordinary circumstances," while others articulate a separate, stand-alone element, every circuit that has squarely addressed the question requires some form of knowing or intentional misrepresentation as a predicate for an estoppel claim under ERISA. Those circuits that have not imposed that requirement simply have not confronted the issue.

The Third Circuit, for example, requires a plaintiff to establish "extraordinary circumstances" in addition to the other elements of an estoppel claim (*i.e.*, material misrepresentation, reasonable reliance, detriment to plaintiff). *See, e.g., Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226, 235 (3d Cir. 1994), cited at Pet. 8. The Third Circuit explained the "extraordinary circumstances" requirement in *Kurz v. Phila. Elec. Co.*, 96 F.3d 1544, 1553 (3d Cir. 1996), where it held that "extraordinary circumstances" ordinarily require "affirmative acts of fraud or similarly inequitable conduct by an employer."[4] An estoppel claim will not lie for "simple ERISA reporting errors or disclosure violations," including even omissions that cause employees to lose or to fail to qualify for benefits. *Id.* (citing *Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, 1142 (3d Cir. 1993); *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310, 1319 (3d Cir. 1991)). An innocent, one-time

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[4] The Third Circuit noted in *Kurz* that it also has found extraordinary circumstances based on a "network of misrepresentations that arises over an extended course of dealing between parties" and that it considers "the vulnerability of particular plaintiffs" (*e.g.*, hospital patients erroneously told, while hospitalized, that they had adequate medical coverage). 96 F.3d at 1553. Neither a "network of misrepresentations" nor particular vulnerability was alleged or shown here.

misstatement, such as that at issue here, cannot support an ERISA estoppel claim in the Third Circuit.

Nor can it do so in the Ninth Circuit, which also requires "extraordinary circumstances." The Ninth Circuit decisions cited by petitioners, *Spink v. Lockheed Corp.*, 125 F.3d 1257 (9th Cir. 1997), and *Pisciotta v. Teledyne Indus., Inc.*, 91 F.3d 1326 (9th Cir. 1996) (per curiam), both rest on that court's earlier decision in *Greany v. Western Farm Bureau Life Insurance Co.*, 973 F.2d 812 (9th Cir. 1992), which set out the elements of an equitable estoppel claim concerning an ERISA plan. *See Spink*, 125 F.3d at 1261; *Pisciotta*, 91 F.3d at 1331. Those elements include proof that "the party to be estopped" – that is, the party who made the alleged misrepresentation – "must know the facts." *Greany*, 973 F.2d at 821. In other words, a knowing misrepresentation is required.

Eleventh Circuit precedent is to the same effect. Petitioners cite *Cotton v. Massachusetts Mutual Life Insurance Co.*, 402 F.3d 1267 (11th Cir. 2005), for the proposition that the Eleventh Circuit "requires only an oral statement and representation which constitutes an oral interpretation of the plan, without requiring intent to deceive," Pet. 11, but petitioners' description of the required elements is incomplete. The standard for ERISA estoppel was first articulated in the Eleventh Circuit in *Kane v. Aetna Life Insurance*, 893 F.2d 1283 (11th Cir. 1990). In that case, the court held that where the provisions of the ERISA plan are ambiguous, and representations are made that constitute an interpretation of the ambiguity as opposed to oral amendments or modifications of the plan, then "[t]he federal common law of equitable estoppel may be applied to the facts

of [the] case." *Id.* at 1286. "The elements of equitable estoppel, as defined by federal common law," include "(1) the party to be estopped misrepresented material facts; [and] (2) the party to be estopped was aware of the true facts ...." *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1326 (11th Cir. 2008). Thus, again, an estoppel can arise only where a knowing misrepresentation is shown.

The Sixth Circuit's formulation is virtually identical. That court requires, among other things, conduct or language amounting to a misrepresentation of material fact and an awareness of the true facts by the party to be estopped. *See Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1298 (6th Cir. 1991), cited at Pet. 10; *see also Trs. of Mich. Laborers' Health Care Fund v. Gibbons*, 209 F.3d 587, 591 (6th Cir. 2000). If the party making the misrepresentation, *i.e.*, the party to be estopped, is aware of the true facts, then that party has made a knowing misrepresentation. *See also Crosby v. Rohm & Haas Co.*, 480 F.3d 423, 431 (6th Cir. 2007) ("Far from trying to deceive Allred.... [a]t most, Crosby has shown that the company made an honest mistake, that in other words it was guilty of misfeasance, not the malfeasance that estoppel requires.").

Although petitioners also point to the First, Second, Fourth, and Fifth Circuits as having adopted rules that conflict with the Seventh Circuit's decision, in reality only the Second Circuit has considered ERISA estoppel in any depth. As petitioners note, the Second Circuit requires "extraordinary circumstances" – in particular, that a promise be made with the specific intent to induce the employee to take action favorable to the employer. Pet. 6-7. As that court has explained, the "extraordinary circumstances" element "require[s] conduct

tantamount to fraud," making clear that reliance on an employer's innocent misstatement will not suffice. *Greifenberger v. Hartford Life Ins. Co.*, 131 F. App'x 756, 759 (2d Cir. 2005) (citing *Devlin v. Transp. Commc'ns Int'l Union*, 173 F.3d 94, 101-02 (2d Cir. 1999)).[5]

The remaining circuits listed by petitioners – the First, Fourth, and Fifth – simply have not addressed in any fashion whether the misrepresentation that forms the basis for an ERISA estoppel claim must have been made with knowledge of falsehood or intent to deceive. Petitioners acknowledge as much concerning the First Circuit, noting that it "has not yet definitively chosen a position." Pet. 13 (citing *Livick v. The Gillette Co.*, 524 F.3d 24 (1st Cir. 2008)).[6] The First Circuit has suggested in *dictum* that, *if* it were to consider an ERISA estoppel claim, it would require "'definite misrepresentations of fact,'" *Mauser v. Raytheon Co. Pension Plan for Salaried Employees*, 239 F.3d 51, 57 (1st Cir. 2001), but it has not yet considered such a claim, and what constitutes a "definite misrepresentation of fact" is therefore unknown. The Fourth Circuit, as noted *supra* at 12, does not permit an estoppel claim where the requested estoppel would effect an amendment to

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[5] *Greifenberger* is consistent with *Schonholz v. Long Island Jewish Medical Center*, 87 F.3d 72 (2d Cir. 1996), the case in which the Second Circuit first articulated the "extraordinary circumstances" requirement. There, as the court explained in *Devlin*, the employer had "intentionally used the promise of severance benefits to win Schonholz's resignation, and then reneged once she resigned." *Devlin*, 173 F.3d at 102.

[6] Petitioners assert that First Circuit panels have recognized "the direct split among circuits," Pet. 14, but the discussion they cite concerns whether an ERISA estoppel claim should be permitted at all, not the elements of such a claim.

a written ERISA plan. Finally, the Fifth Circuit, like the Second, Third, and Ninth Circuits, requires "'extraordinary circumstances.'" *See High v. E-Sys. Inc.*, 459 F.3d 573, 579 (5th Cir. 2006). The Fifth Circuit has not addressed whether a knowing or intentional misstatement is required for an ERISA estoppel claim. It has, however, looked to Third Circuit caselaw for guidance concerning "extraordinary circumstances," *see id.* at 580 & n.3. In the Third Circuit, as noted above, a negligent misstatement will not suffice.

So, far from showing a clear conflict warranting this Court's attention, petitioners have established only that some circuits have addressed the knowing misrepresentation question and others have not and that, among those that have, differences in phrasing can be found. That such differences exist is hardly surprising in light of the fact-specific nature of estoppel claims. What matters for present purposes is that, substantively, there is neither conflict nor confusion in the lower federal courts concerning any question properly presented here. Under no circumstances can a claimant prevail on an ERISA estoppel claim based on an innocent oral misstatement by a non-fiduciary, non-administrator who directs claimants to the proper source for information concerning an unambiguous ERISA pension plan.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

CONSTANTINE L. TRELA, JR.*
PRISCILLA E. RYAN
ERIN E. KELLY
JULIE M. WEBER
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, Illinois 60603
(312) 853-7000

Counsel for Respondents Quaker Oats Company and PepsiCo

July 7, 2008

* Counsel of Record